United States Court of Appeals

for the Second Circuit

BRIEF FOR APPELLANT

74-1550

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P/S

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

UNITED STATES OF AMERICA,

Appellee,

-against-

WILLIAM ALONZO,

Appellants.

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

BRIEF FOR APPELLANT

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UNITED STATES COURT OF APPEALS
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UNITED STATES OF AMERICA,

-against-

WILLIAM ALONZO, et al.,

Appellants.

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STATEMENT OF THE CASE

The appellant William Alonzo was charged in Count One of this indictment with conspiracy to violate Sections 173, 174, 841(a)(1) and 841(b)(1)(A) of Title 21, United States Code. Thirty-one co-defendants were named in the indictment. There were twenty-nine substantive counts in the indictment, none of which involved the defendant William Alonzo.

Upon a trial by jury, Mr. Alonzo was convicted of the sole count with which he was charged, the Honorable Kevin Duffy presiding. On May 2, 1974 Mr. Alonzo was sentenced to eight years' imprisonment plus five years' special probation.

At the trial the proof the government offered regarding William Alonzo was in the form of testimony from two parties, Harry Pannirello and Jimmy Provitera.

Harry Pannirello testified that he knew the defendant Alonzo only by the name Butch Ware (T-2191), that he met Mr. Alonzo at the co-

defendant Hattie Ware's apartment in the Bronx (T-2191) during 1972, and that he knew Mr. Alonzo to be the co-defendant Hattie Ware's brother (T-2190).

Harry Pannirello further testified that he had a conversation with Mr. Alonzo in Hattie Ware's apartment with no one else present wherein Mr. Alonzo said that "he wanted to get rolling again and he didn't have any money" (T-2192). Harry Pannirello replied by saying okay and giving Mr. Alonzo two ounces of heroin for a price of two thousand dollars, of which Mr. Pannirello received fifteen or sixteen hundred dollars and never got the balance (T-2192-3).

Jimmy Provitera then testified that in late January or early February, 1972 (T-2969) pursuant to instructions given him by his brother-in-law Harry Pannirello he proceeded to the apartment of Hattie Ware on University Avenue in the Bronx where he met Hattie Ware and Butch Ware (the defendant-appellant William Alonzo), who were introduced to him by Harry Pannirello (T-2971). Shortly thereafter, the co-defendant Basil Hansen arrived.

At that point Basil Hansen, Harry Pannirello, Jimmy Provitera and William Alonzo went into Mr. Alonzo's bedroom. Jimmy Provitera gave one package of heroin to Harry Pannirello who then gave the package to Basil Hansen. This transaction took about four or five minutes and then Mr. Pannirello and Mr. Provitera left the apartment (T-2973).

The above was the sum total of testimony at the trial that mentioned

the defendant William Alonzo. Not being directly relevant, it is left to co-appellants' briefs to state in detail the factual recitation of each co-appellant. Suffice it to say that the proof at trial showed many transactions over a period of several years involving more than twenty-five persons.

The defendant's motion to acquit at the close of the government's case was denied and the defendant's motion to vacate the conviction was denied on May 2, 1974.

POINT I

TAKEN IN THE LIGHT MOST FAVORABLE TO THE GOVERNMENT, THE EVIDENCE AGAINST THE APPELLANT ALONZO SHOWS ONLY A SINGLE TRANSACTION WHICH DOES NOT PERMIT AN INFERENCE OF AGREEMENT TO WILFULLY ENTER AND CONTINUOUSLY PARTICIPATE IN THE CONSPIRACY.

"The gist of the offense of conspiracy . . . is agreement among the conspirators to commit an offense attended by an act of one or more of the conspirators to effect the object of the conspiracy." UNITED STATES V. FALCONE, 311 U.S. 205 at 210 (1940). The essence of the crime of conspiracy is agreement. Therefore, in order to prove that a defendant conspired to possess with intent to distribute and to distribute heroin, the government must offer sufficient evidence of the fact that the defendant became a party to the agreement and willingly participated in the conspiracy.

Since every sale, purchase, delivery or act of distribution of narcotics by definition involves an agreement of two persons, the separate and distinct crime of conspiracy is not established by every act to sell, buy, deliver or distribute narcotics. UNITED STATES V. ZUELI, 317 F. 2d 845 (2nd Cir. 1963). Therefore, the isolated fact of a purchase or delivery of narcotics from a conspirator does not necessarily permit an inference that the purchaser or deliverer is a conspirator.

Where the evidence against a defendant consists only of a single

transaction, or of a single transaction plus other equivocal activity, then that single transaction or other equivocal activity must be scrutinized to see if it permits an inference of knowing entry and willful participation in the conspiracy. As this Court said in UNITED STATES V. AVILES, 274 F. 2d 179 (2nd Cir. 1960):

> " A single act may be the foundation for drawing the actor within the ambit of the conspiracy. [citations omitted] But since conviction of conspiracy requires an intent to participate in the unlawful enterprise, the single act must be such that one may reasonably infer from it such an intent. "
> (272 F. 2d at 189)

In a case where the proof has been merely that of a single transaction of narcotics, logic would appear to demand and this Court has consistently held that it is insufficient proof of entry into and participation in a conspiracy.

The entire evidence against the appellant in this case consists of two events at the Bronx apartment on University Avenue of the appellant's sister, Hattie Ware.

The issue raised by this appeal is whether a scrutiny of these events, either simply or together, reveals sufficient evidence so that " a reasonable mind might fairly conclude guilt beyond a reasonable doubt" that the appellant willfully joined and participated in this conspiracy. CURLEY V. UNITED STATES, 160 F. 2d 229, 232-33

(D. C. Cir. 1947), cert. denied, 331 U.S. 837 (1947). UNITED STATES V. TAYLOR, 464 F. 2d 240 (2nd Cir. 1972).

Chronologically the first event was during January or February 1972 when Jimmy Provitera accompanied Harry Pannirello to the apartment specifically for the purpose of making a heroin delivery. Jimmy Provitera stated that he was introduced to Hattie Ware and the appellant by Harry Pannirello and that the four of them waited a few minutes until Basil Hansen arrived. Upon Mr. Hansen's arrival the four men went into the appellant's bedroom where Jimmy Provitera handed a package of heroin to Harry Pannirello, who in turn handed the package to Basil Hansen. The transaction took about four or five minutes and upon completion, Harry Pannirello and Jimmy Provitera immediately left the apeartment.

It is submitted that this event standing alone is insufficient to bring the appellant within the ambit of this conspiracy. Judge Friendly of this Court said in UNITED STATES V. GARGUILO, 310 F. 2d 249, 253 (2nd Cir. 1962):

> " But knowledge that a crime is being committed, even when coupled with presence at the scene, is generally not enough to constitute aiding and abetting. "

It is noteworthy that at the apartment on University Avenue there was no evidence whatsoever of a discussion of either a general nature or of the specifics of this heroin transaction between the appellant and either Jimmy Provitera or Harry Pannirello. Further, at not time did

the appellant ever physically have possession of the heroin, as did the other three. There was no evidence of any discussion of this transaction between Basil and the appellant. The heroin was apparently not intended for the appellant since neither of the heroin deliverymen (Pannirello and Provitera) would give the heroin to the appellant but rather waited until Basil Hansen arrived to take possession of the drugs. And finally, there was no evidence at all of any discussion or understanding that this was an organized or ongoing activity or a conspiracy.

At most it can be said that the appellant stood by and said nothing while three other men conducted a narcotic transaction.

Under these circumstances it would appear that the principle stated in GARGUILO, supra, and recently reaffirmed by this Court in UNITED STATES V. TERRELL, 474 F. 2d 872 (2nd Cir. 1973), would not permit an inference based on the facts of this event that the appellant joined the conspiracy.

The second event, and in effect all of the rest of the evidence against the appellant at trial, was a meeting at the same apartment about a month later, in March 1972 between Harry Pannirello and the appellant. No one else was present.

At this meeting the appellant purchased two ounces of heroin for two thousand dollars from Harry Pannirello. Mr. Pannirello testified

that the appellant said he wanted to get rolling again and didn't have any money.

While it is conceded that the appellant participated in a narcotic transaction as a purchaser, again it is submitted that a close look at this event does not establish the appellant as a member of a conspiracy.

It is particularly noted that Harry Pannirello testified to a course of conduct which consited of regular ongoing sales and deliveries of heroin to many purchasers on a repeating basis. The record at trial clearly indicates that as to the appellant this was the only time Harry Pannirello or anyone else sold him heroin.

There was no discussion of the mechanism of a conspiracy or plan or agreement for further purchases by the appellant.

Previous decisions by this Court are instructive on the issue of whether this single purchase of narcotics may be the foundation of a finding that the appellant joined the conspiracy.

In UNITED STATES V. KOCH, 113 F. 2d 982 (2nd Cir. 1940), the defendant Koch purchased 170 ounces of cocaine from the conspirator Mauro at twenty-five dollars per ounce. He sold some of it and returned some portion of it to Mauro complaining of bad quality. In holding that this evidence was insufficient to tie Koch into the conspiracy, this Court said:

> " It has been strenuously argued that the utmost reach of the proof made him out to be only an isolated purchaser from the conspirators and

> not proved guilty of the crime charged in the indictment even though the purchase was unlawful. It is apparent that there is real difficulty in this respect. The amount of the cocaine purchased would, of course, indicate that it was taken not for personal consumption alone but for resale. But the appellant was not a steady purchaser from the conspirators and so it cannot be inferred as it was in United States v. DeVasto, 2nd Cir., 52 F. 2d 26, 78 ALR 36, that he knew of the conspiracy and was acting to further its ends rather than exclusively his own. The purchase of the cocaine from Mauro was not enough to prove a conspiracy in which Mauro and the appellant participated. They had no agreement to advance any joint interest. The appellant bought at a stated price and was under no obligation to Mauro except to pay him that price. The purchase alone was insufficient to prove the appellant a conspirator with Mauro and those who were his co-conspirators."
> (113 F. 2d at 983)

The case against Koch was actually stronger than the case against Alonzo since the fact that Koch had an option to return some of the narcotics to Mauro could have been found to indicate an ongoing relationship. This Court found, however, that the purchase and return constituted a single transaction which was insufficient proof that Koch entered into and participated in the conspiracy.

In UNITED STATES V. REINA, 242 F. 2d 302 (2nd Cir. 1957), the defendant Valachi sold heroin to a conspirator Shillitani who later sought him out to complain about the quality of the drugs. Hearing of the bad narcotics Valachi responded:

> " I can do nothing. It is the way I get it, it is the way I give it. I give you my word I never touch it. The way I get it is the way I give it to you. Any further time I can make good for it, let us see." (242 F. 2d at 305)

That conversation could be interpreted that Valachi had dealt with Shillitani in the past and expected to do so in the future. This Court, however, declined to hold Valachi was a member of the conspiracy, stating that while his sale was not inconsistent with membership in a larger venture, it was equally consistent with his being an independent seller of narcotics, whom Shillitani selected as the most immediately available source of supply.

It would certainly appear that the evidence against Valachi was substantially stronger than the case against the appellant here in that Valachi was the seller and supplier and that Valachi spoke directly of further contacts. Here by contrast, the appellant Alonzo was the mere one-time purchaser and there were no discussions regarding any further contact. And, in fact, the evidence shows there were no further contacts.

In UNITED STATES V. STROMBERG, 268 F. 2d 256 (2nd Cir. 1959), Snyder, a customs agent, was proved to have delivered a large quantity of heroin to two conspirators. In reversing his conviction this Court said:

> " We also think that the conviction of the appellant Snyder must be reversed. At

> the trial, it was stipulated that Snyder had been introduced to either Aron or Baruche in 1949, before the conspiracy began. Aside from this, which standing alone was insufficient to support a conviction, the only incident connecting Snyder with the conspiracy is the delivery of two suitcases, later found to contain heroin to Vellucci and Ewing in Hoboken. In United States v. Reina, 2nd Cir., 242 F. 2d 302, certiorari denied sub nom. Moccio v. United States, 354 U.S. 913, 77 S. Ct. 1294, 1 L. Ed. 2d 1427 we held that participation in a single isolated transaction was an insufficient basis upon which to bottom an inference of continuing participation in a conspiracy. For aught that appears in this record, this was Snyder's only transaction with the group; under the reasoning of the Reina case, the evidence is insufficient to support the inference that Snyder knew or accepted the conspiratorial aims or that his participation went beyond the single transaction."
> (286 F. 2d at 267)

It is submitted that the same may be said regarding the appellant Alonzo: the evidence at trial against him was insufficient to support the inference that Alonzo knew or accepted the conspiratorial aims or that his participation went beyond the single transaction.

In UNITED STATES V. AVILES, 274 F. 2d 179 (2nd Cir. 1960), the proof showed that the defendant Rodriguez purchased narcotics from a central conspirator Cantellops. This Court reversed even assuming Rodriguez knew that the narcotics were illegally imported. The Court reasoned that there was no evidence that Rodriguez was a regular

customer of Cantellops and an insufficient basis for assuming that he knew Cantellops was an agent for an existing conspiracy. The Court went on to state:

> " The single purchase alone was not enough to prove that Rodriguez was a participant in the conspiracy. It was necessary to the government's case to submit evident that Rodriguez knew of the conspiracy and associated himself with it."
> (274 F. 2d at 190)

In the case at bar, there is no evidence in the record to show that Alonzo knew Pannirello was an agent for an existing conspiracy, nor any evidence that Alonzo was a regular customer of Pannirello's. As with Rodriguez in AVILES, supra, this Court can fairly look at this evidence and conclude that it is insufficient to show that Alonzo knew of the conspiracy and associated himself with it.

It is submitted that, as scrutinized above, neither of the only two bits of evidence concerning the appellant Alonzo, standing alone, are sufficient to warrant a finding that the appellant joined the conspiracy.

It is further submitted that even when considered together these two bits of evidence concerning the appellant Alonzo do not warrant a finding that he knew of the conspiracy and associated himself with it.

Notably lacking in the sum of the evidence against the appellant is any indication, however faint or oblique, that the appellant ever knew

that a conspiracy existed. Certainly neither Jimmy Provitera nor Harry Pannirello ever mentioned anything, directly or indirectly, about a conspiracy to the appellant, according to the evidence. While it is true that it is frequently asserted by the prosecution that in the case of criminal conspiracies much is assumed or unsaid, it is submitted that where the evidence is as marginal as it is against this appellant, some more definite statement which would clearly indicate that the appellant was aware of the conspiracy is needed to uphold a finding that the appellant joined the conspiracy. The record in this case reveals that at no time did either the appellant or any other party in his presence ever make any statement which implied any conspiratorial agreement.

Lacking in this record is proof that the appellant Alonzo did "in some sense promote their venture himself, make it his own." UNITED STATES V. FALCONE, 109 F. 2d 579, 581 (2nd Cir. 1940). See also, UNITED STATES V. FREEMAN, F. 2d , (2nd Cir. 1974) slip opinion 4011.

Considering both the cases discussed above and the evidence in the record, taken in the light most favorable to the government, it is submitted that the proof is insufficient both as a matter of logic and law to infer that the appellant William Alonzo entered into and participated in the conspiracy; therefore, the conviction for the count of conspiracy, the sole count against the appellant, must be reversed and that count dismissed as to the appellant Alonzo.

POINT II

THE APPELLANT ALONZO ADOPTS ALL ISSUES AND ARGUMENTS RAISED BY THE CO-APPELLANTS AS IF FULLY SET FORTH HEREIN.

Pursuant to Rule 28(i) of the Federal Rules of Appellate Procedure, the appellant William Alonzo adopts all issues and arguments raised by the co-appellants as if fully set forth herein.

It is anticipated that among the issues raised by co-appellants will be that of the admission into evidence of approximately one million dollars in United States currency seen in the possession of one conspirator who was never shown to have any direct relation to the defendant Alonzo. It is here merely noted that whatever force that argument has as to the appellant from when the currency was recovered, the argument would appear to be even more forceful as to the appellant Alonzo since he is far removed from any contact with the nearly one million dollars.

CONCLUSION

The judgment of conviction of the appellant William Alonzo should be reversed.

Respectfully submitted,

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